IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-1907

MISSISSIPPI POWER COMPANY,
Petitioner,

V.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
THE ATTORNEY GENERAL OF MISSISSIPPI,
MISSISSIPPI LEGAL SERVICES COALITION,
THE UNITED STATES OF AMERICA.
Respondents.

BRIEF OF MISSISSIPPI PUBLIC SERVICE COMMISSION IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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INDEX

ALPHABETICAL TABLE OF CASES AND AUTHORITIES:

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MISSISSIPPI POWER COMPANY,
Petitioner

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BRIEF OF MISSISSIPPI PUBLIC SERVICE COMMISSION IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Respondent Mississippi Public Service Commission respectfully opposes the petition of Mississippi Power Company for a writ of certiorari to review the judgment of the Supreme Court of Mississippi rendered March 23, 1983, affirming an order of the Mississippi Public Service Commission dated April 16, 1981, and in support thereof shows the following:

I. THE ACTION OF THE MISSISSIPPI PUBLIC SERVICE COMMISSION WAS SUPPORTED BY THE EVIDENCE

The basis of the adjustment by the Mississippi Public Service Commission was explained in its order (Pet. App. A, p. 5a-7a and 18a-19a) and was supported by the evidence. The sale of one-half interest in Plant Daniel Unit 1 to Gulf Power Company and purchase of one-half interest in Plant Daniel Unit 2 from Gulf Power Company had previously been approved by the Commission. But the transaction was approved based upon the cost estimates of the Company which were approximately half of the amount shown at the subject rate hearing. In 1977, the Company reported that the cost to Mississippi Power Company would ultimately amount to $16,000,000; the amount actually proposed as a rate base addition was $38,000,000. The previous order of the Commission simply stated that after Unit 2 was completed "the necessary adjustment" would be made so that each party could have a 50% ownership interest in both units and the common facilities. (Pet. App. F, par. 5e, p. 101a)

The evidence showed that the increase was due to cost overruns and construction delays of Gulf Power Company and not Mississippi Power Company. Therefore, the Commission found that such increase should be borne by the ratepayers of Gulf Power Company and not Mississippi Power Company. The Commission found the Mississippi Power Company ratepayers would obtain absolutely no gain in capacity, i.e., out of Plant Daniel Mississippi Power Company had 500 Mw. After the transfers,

Mississippi Power Company would still have 500 Mw. from Plant Daniel. It is Gulf Power Company that will own and have access to an additional 500 Mw. Mississippi Power Company will be no better off from a power supply position. The only change to Mississippi Power Company ratepayers would be that they would have to pay rates on a rate base increased by $38,000,000. The Company failed to even claim credit for the enchanced value of Unit 1 because of the inflation it so frequently embraced in justifying its increased costs. The only advantage the Company could cite was that Plant Daniel Unit 2 would be a few years younger and that there would be some increased reliability. The evidence shows that such a contention was not quantified, and especially in view of the Company's participation in the Southern Pool (sharing of excess power by all of the Southern companies), was minimal. The Company had shown that the plant accounts would increase $38,000,000 and, as stated above, half of that amount was attributable to cost overruns and construction delays of Gulf Power Company. Consequently, the Commission ordered that the Company's total rate base be reduced by half of the cost or $19,000,000. The action of the Commission was supported by the testimony of Dr. John Wilson, which was as follows, to wit:

> "I have revised the Company's proposed test year adjustment to account for the increased cost of Unit No. 2 of the Jackson County plant. Pursuant to the Commission's Order of August 27, 1976 in Docket U-3168, MPCo sold a one-half undivided interest as tenants in common in its Jackson County Steam Plant to Gulf Power, an

affiliated member of the Southern Company. This transaction was proposed due to MPCo's earlier overestimate of its own generation capacity requirements and Gulf's corresponding need for more capacity at a time when MPCo Jackson County plant was under construction. The Commission approved the proposed sale based on the belief that it would be in the best economic interest of both the Company and its customers. The financial details of the proposed transaction were not specified and approved in the Commission's 1976 order. The order simply stated that after Unit 2 was completed "the necessary adjustments" would be made so that each party would have a 50% ownership interest in both units and the common facilities. No financial details as to "the necessary adjustments" were specified. It is clear, however, that the Commission did contemplate that the transaction, as ultimately consummated, would be economically beneficial to all concerned and would thus serve the public.

"It is questionable that the specific financial details as proposed by MPCo for ratemaking treatment in this case was consistent with the Commission's 1976 determination that the transaction be in the best economic interest of both the Company and its customers. The end result of the Company's proposed ratemaking treatment here is to substantially increase the financial burden of Mississippi consumers without giving them one more kilowatt of electricity. This result occurs because upon completion of Unit 2 at the Jackson County

Steam Plant, which has been owned and financed by Gulf pursuant to the Commission's approval in 1976, MPCo will, in effect, trade Gulf a half interest in its own Unit 1 for a half interest in Unit 2. Of course, since Unit 1 was completed about four years earlier than Unit 2, Unit 2 is more costly and thus the trade results in a substantial increase in the cost of MPCo's rate base without any addition of capacity.

"The excess cost of Unit 2 over Unit 1 was more than was contemplated at the time the commission approved the transaction. The Company reported in 1977 that the cost of MPCo would ultimately amount to $16,000,000.00, the amount actually proposed as a rate base additional in this case is $38,000,000.00. **While the Commission may determine that an appropriate rate base adjustment is warranted in this regard,** I believe that, at a minimum, the cost-overrun should be considered in arriving at the allowed rate of return in this case and that such consideration warrants a return allowance at the bottom on the application range." (Emphasis added)

In evaluating the interest of the ratepayers of Mississippi Power Company in the total Plant Daniel transaction, it was appropriate for the Commission to consider the tremendous reserve capacity of Mississippi Power Company which was 50% in 1979, 34% in 1980, and 40% in 1981.

For the same reason the Commission was justified in reducing the Company's rate base by the amount of $1,138,500 which represented the dif-

ference in the cost of coal cars originally purchased by the Company for use in operating Unit 1 and the cost of coal cars to Gulf Power Company several years later obtained for use in providing fuel for Unit 2 of Plant Daniel.

Making such adjustments is not only the prerogative of the Commission - it is the duty of the Commission. As stated in **Mississippi Public Service Commission v. Mississippi Power Co.,** 33 So. 2d 936 (Miss. 1976), quoting from **Los Angeles G. & E. Corp. vs. Railroad Com.,** 289 U. S. 287, 53 S. Ct. 637, 77 L. Ed. 1180 (1932):

> "It is the appropriate task of the commission to determine the value of the property affected by the rates it fixes, as that of an integrated operating enterprise, and it is the function of the court in deciding whether rates are confiscatory not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use."

II. PETITIONER WAS NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW

The petitioner cites in support of its contention that it had been deprived of property without due process of law the cases of **Bluefield Water Works Co. v. Public Service Comm. of West Va.,** 262 U. S. 679, 67 L. ed. 1176 (1922); **Chicago Milwaukee & St. Paul Railway Co. v. Public Utilities Comm.,** 274 U. S. 344, 71 L. ed. 1085, 1090

(1927); **Federal Power Comm. v. Hope Natural Gas Co.,** 320 U. S. 519, 88 L. ed. 333 (1944); **Laclede Gas Light Co. v. Public Utilities Comm. of Missouri,** 8 F. Supp. 806, 6 PUR (NS) 72, (3 Judge District Court, MO.) (1934); and **Northern P. R. Co. v. Dept. of Public Works,** 268 U. S. 39-44, 69 L. ed. 837-84 (1925); **Ohio Bell Telephone Co. v. Public Utilities Comm.,** 301 U. S. 292, 81 L. ed. 1093 (1937).

The **Bluefield v. Public Service Comm.,** supra, case is indeed one of the landmark cases of utility regulation, for it establishes the standards of a fair return. It also specifies that this ascertainment is not controlled by artificial rules or formulas, but upon a proper consideration of all of the relevant facts. This is precisely what the Mississippi Public Service Commission did - evaluate all of the facts pertaining to Plant Daniel and not just the figure the Company placed in rate base. There was certainly no deliberate underevaluation of property without evidentiary support. There was deliberte evaluation on the basis of the evidence and testimony presented to the Commission. As shown above the testimony of Dr. John Wilson was ample evidentiary support and the order of the Commission recited the reason for its action.

The **Federal Power Commission v. Hope Natural Gas Co.,** supra, case is also noteworthy in the field of utility regulation. It enunciates the standard of return to the equity owner but it also makes it plain that the regulatory body has great discretion in determining any rate base on which a return is to be computed. It is sound authority for the action taken by the Mississippi Public Service Commission

in the instant case.

The cases of **Northern Pacific R. Co. v. Dept. of Public Works,** supra, **Chicago M. & St. Paul Railway Co. v. Public Utilities Comm.,** supra, and **Laclede Gas Light Co. v. Public Utilities Comm. of Missouri,** supra, are all cases which hold that it is a denial of due process to value property for rate making purposes without evidence. There is no argument with the holdings of any of these cases. They simply are not applicable to the case of the petitioner, for there was testimony and additional evidence supporting the action of the Commission.

Neither is the case of **Ohio Bell Telephone Co. v. Public Utilities Comm.,** supra, relevant to the present matter. It deals with the denial of due process because the Commission failed to give proper notice and hearing. The petitioner attempts to link the cases because of a previous certificate from the Mississippi Public Service Commission authorizing the construction. But as hereinabove shown, that certificate was predicated upon evidence that the cost would be half of what was ultimately claimed. And the Mississippi Public Service Commission only reduced the claimed amount by half. The first opportunity that the Commission had of knowing what would be claimed by the Company was when it filed its petition for rate increases. The staff witness, Dr. John Wilson, whose testimony is reproduced above, testified that it would be appropriate for the Commission to make the adjustment. And the Company had opportunity to and did present contradicting evidence in its rebuttal portion of the hearing. There is no showing in this record of a lack of notice or hearing which violates due process.

III. THERE ARE NO STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

Rule 19 indicates that the court will consider a review on writ of certiorari where a state court has decided a federal question of substance not theretofore determined by the court, or has decided it in a way probably not in accord with applicable decisions of this court. The Mississippi Supreme Court in this case has not decided a federal question of substance not theretofore determined by this court. It has not rendered a decision in a way probably not in accord with the applicable decisions of this court. It has only determined that the Mississippi Public Service Commission made a rate base adjustment which was supported by the evidence.

The petitioner filed for rate increases with the Mississippi Public Service Commission. After proper notice and a full hearing, the Mississippi Public Service Commission determined from the evidence and testimony in its finding of fact that the petitioner's claim for allowance of Plant Daniel in its rate base was excessive and reduced same by half. This adjustment was supported by the evidence and the specific testimony of staff witness, Dr. John Wilson. It is authorized by statutory and case law and is a routine function of regulatory commissions. This adjustment to rate base under the facts, testimony and evidence is certainly no issue of great public importance.

IV. CONCLUSION

For the foregoing reasons a writ of certiorari should not issue to the Supreme Court of Mississippi.

Respectfully submitted,

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by: /s/ BENNETT E. SMITH
COUNSEL OF RECORD

CERTIFICATE OF SERVICE

I, Bennett E. Smith, counsel of record for the Mississippi Public Service Commission, do hereby certify that I have this date served a true and correct copy of the foregoing Brief Of Mississippi Public Service Commission In Opposition To Writ Of Certiorari To The Supreme Court Of Mississippi on Honorable Hassell H. Whitworth, Watkins & Eager, P. O. Box 650, Jackson, Mississippi 39205, Honorable Ben H. Stone, Eaton, Cottrell, Galloway & Lang, P. O. Drawer H, Gulfport, Mississippi 39501, and Honorable John L. Maxey, II, Cupit & Maxey, P. O. Box 22666, Jackson, Mississippi 39205, by United States mail, postage prepaid.

THIS the 20th day of June, A. D., 1983.

/s/ BENNETT E. SMITH
OF COUNSEL for RESPONDENT